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No. 91-1901

In The

# Supreme Court of the United States

October Term, 1991

GENERAL ELECTRIC CAPITAL CORPORATION,

*Petitioner,*

v.

NORTH COUNTY JEEP & RENAULT, INC.,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Ninth Circuit properly conclude that an administrative expense claimant has standing under 11 U.S.C. § 506(c)[1] to recover from property securing an allowed secured claim its reasonable and necessary costs and expenses of preserving such property.

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[1] All chapter and section references herein are to the Bankruptcy Code, 11 USC § 101-1330, unless otherwise indicated.

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

North County Jeep and Renault, Inc. ("North County" or "Respondent") respectfully submits this opposition to General Electric Capital Corporation's ("GECC" or "Petitioner") Petition for Writ of Certiorari.

## PROVISION OF LAW INVOLVED

The single provision of federal law in question is § 506(c) of the Bankruptcy Code, Title 11 of the United States Code, which states:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of, such property to the extent of any benefit to the holder of such claim.

## STATEMENT OF THE CASE

Palomar Truck Corporation ("Palomar") filed a voluntary petition for relief under the provisions of Chapter 11 of the Bankruptcy Code in March 1988 and served as debtor-in-possession until June 1988, when the Court appointed a Trustee for the Palomar estate. Respondent negotiated an agreement with the Trustee by the terms of which Respondent would purchase Palomar's motor vehicle dealership. Respondent agreed to operate Palomar as agent for the Trustee while the Trustee obtained Court approval of Respondent's purchase.

In July 1988, the Trustee's motion to sell the dealership to Respondent came on for hearing in the United States Bankruptcy Court, Southern District of California. Notwithstanding the representation of the Trustee to Respondent that the offer of Respondent would not be subject to overbid, the Court found that it had discretion to entertain overbids. The successful bidder was Sunroad

Capital Corporation with a bid of $495,000.00. Upon Sunroad Capital Corporation's successful bid, Respondent immediately terminated its operation of Palomar.

In February 1989, Respondent brought its motion before the United States Bankruptcy Court, Southern District of California, seeking allowance of administrative expenses in the amount of $66,601.79 (the amount of Respondent's operating loss during its interim operation of the business on behalf of the Trustee), and for an order that the allowed administrative expense be paid from properties securing a secured claim.

Respondent's motion that the operating loss be allowed as an administrative expense was granted in the amount prayed for. However, the Court ruled as a matter of law that Respondent lacked standing to recover its administrative expense under § 506(c) which provides for recovery of administrative expenses from property securing an allowed secured claim. (Petition Appendix, at 17a-18a.)

Respondent filed a timely appeal with the Bankruptcy Appellate Panel for the Ninth Circuit from the Bankruptcy Court's ruling as a matter of law that Respondent lacked standing to recover its administrative expense under § 506(c). On July 23, 1990, the Bankruptcy Appellate Panel filed its opinion affirming the Bankruptcy Court's order. (Petition Appendix, at 7a-16a.) Respondent filed its Motion for Rehearing on August 2, 1990. The Bankruptcy Appellate Panel's Order denying Respondent's Motion for Rehearing was entered on August 23, 1990. (Petition Appendix, at 20a.)

Respondent then filed a timely appeal with the United States Court of Appeals for the Ninth Circuit from the Bankruptcy Appellate Panel's ruling affirming the Bankruptcy Court's order. On December 16, 1991, the United States Court of Appeals filed its opinion reversing and remanding the Bankruptcy Appellate Panel's order. (Petition Appendix, at 1a-6a.) The United States Court of Appeals for the Ninth Circuit agreed with the United States Court of Appeals for the Third Circuit that standing need not be limited to trustees and debtors in possession. *Ibid.*

Petitioner filed its Petition for Rehearing and Suggestion That Rehearing Be En Banc on or about December 28, 1991 and its First Amended Petition for Rehearing and Suggestion That Rehearing Be En Banc on or about December 30, 1991. The United States Court of Appeals' Order denying Petitioner's First Amended Petition for Rehearing and rejecting the suggestion for rehearing en banc was entered on February 27, 1992. (Petition Appendix, at 19a.)

## REASONS FOR DENYING PETITION

### I

### THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 10 STANDARD OF PRESENTING SPECIAL OR IMPORTANT REASONS FOR REVIEW ON WRIT OF CERTIORARI

The petition for writ of certiorari does not meet the standard of Supreme Court Rule 10. The Rule provides, in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Rule 10 lists several reasons that might satisfy this high standard. Petitioner does not even arguably fit within any reason except the provision of Subsection 10(c), which provides that review may be proper when "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. . . . "

Yet here, although the Ninth Circuit decided a matter of importance, the court did not depart from established legal precedent. Standing need not be limited to trustees and debtors in possession[2] under § 506(c) to recover from property securing an allowed secured claim the reasonable and necessary costs and expenses of preserving such property. *See, e.g., In re McKeesport Steel Castings Co.*, 799 F.2d 91 (3rd Cir. 1986); *Matter of Delta Tower, Ltd.*, 924 F.2d 74 (5th Cir. 1991); *In re Parque Forestal, Inc.*, 949 F.2d 504 (1st Cir. 1991); *In re T.P. Long Chemical, Inc.*, 45 Bankr. 278 (Bankr. N.D. Ohio 1985); *In re Isaac Cohen Clothing Corp.*, 39 Bankr. 199 (Bankr. S.D.N.Y. 1984). Courts have extended standing under § 506(c) to those administrative expense claimants discharging a duty of the trustee (*see, e.g., In re T.P. Long Chemical Inc.*, 45 Bankr. 278, 287), where the administrative expenses were reasonable, necessary and the secured creditors benefitted from the expenses (*see Matter of Delta Tower, Ltd.*, 924 F.2d 74).

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[2] *See* § 1107(a) entitling a debtor in possession to the rights and powers of a trustee in a case under Chapter 11.

Here, Petitioner does not contend that the Court of Appeals failed to consider whether Respondent was discharging a duty of the trustee or whether the expenses were indeed administrative expenses. It is undisputed that but for Respondent's interim operation of the Palomar estate, "the business would have closed, the franchise agreements would have been terminated and 'presumably the value of the business would have been significantly reduced.' " *In re Palomar Truck Corp.*, 951 F.2d 229 (9th Cir. 1991).

Rather, Petitioner disputes the outcome of the Ninth Circuit's conclusion that on the facts of this particular case, Respondent does have standing under § 506(c) to recover from property securing an allowed secured claim its reasonable and necessary costs and expenses of preserving such property. Therefore, Petitioner fails to satisfy Rule 10 because the Ninth Circuit's decision does not decide questions of federal law which have not been, but should be, settled by this Court.

## II

## THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

### A. Petitioner Overlooks the Facts of This Particular Case In Applying the "Plain Meaning" Rule of Statutory Construction.

As Petitioner indicates, "[t]he plain meaning of the legislation should be conclusive, except in the 'rare cases' [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its

drafters." (Petition, at 9 citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).)

Here, Respondent agreed to operate the Palomar estate as agent *for the Trustee* while the Trustee obtained Court approval of Respondent's purchase of Palomar. It is undisputed that Respondent's operation of the Palomar estate greatly benefited Petitioner in preserving the going concern value of the business and saving the franchise agreements from termination. *In re Palomar Truck Corp.*, 951 F.2d 229 (9th Cir. 1991). It is also undisputed that the Trustee has no economic incentive to seek recovery under § 501(c) since recovery passes directly to Respondent, not the Palomar estate. Petitioner's failure to reimburse Respondent its reasonable and necessary costs and expenses of preserving the Palomar estate will result in a windfall for Petitioner at the expense of Respondent.

The Ninth Circuit fully considering the facts particular to the case and agreeing with the Third Circuit, correctly decided that standing under § 506(c) need not be limited to trustees and debtors in possession. *Ibid.* Where the trustee has "no economic incentive to seek recovery under § 506(c) since the recovery would pass to the claimant with no gain to the estate" and failure to grant the claimant standing would result in "a windfall for the secured creditor at the expense of the unpaid claimant", standing under § 506(c) may be extended to third-party claimants. *Ibid.*

The exception to the "plain meaning" rule correctly applies in cases where the trustee fails to seek recovery under § 506(c) and failure to grant the claimant standing

under § 506(c) results in a windfall to the secured creditor.

**B. The Bases for Granting Third Party Standing Under § 506(c) Is a Well Defined Standard.**

The Third Circuit in *McKeesport* reasoned that a third party claimant had standing under § 506(c) since the trustee had no reason to make a claim on claimant's behalf. *In re McKeesport Steel Castings Co.*, 799 F.2d 91, 94 (3rd Cir. 1986). In addition, the Third Circuit reasoned that failure to grant the third party claimant standing under § 506(c) would result in failure of a justified claim being brought against the secured creditors. *Ibid.*

The Ninth Circuit directly bases its reasoning in this case on the reasoning applied by the Third Circuit in *McKeesport*. The Ninth Circuit in *Palomar* states in pertinent part:

> Like the trustee in *McKeesport*, the trustee here had no economic incentive to seek recovery under § 506(c), since the recovery would pass to the claimant with no gain to the estate. As in *McKeesport*, if only the trustee were allowed standing, the result would be a windfall for the secured creditor at the expense of the unpaid claimant. . . . We agree with the Third Circuit that standing need not be limited to trustees and debtors in possession.

*In re Palomar Truck Corp.*, 951 F.2d 229 (9th Cir. 1991).

The Fifth Circuit in *Delta Tower* also directly relies on the reasoning in *McKeesport* in granting standing to third party claimants. *Matter of Delta Tower, Ltd.*, 924 F.2d 74, 76

(5th Cir. 1991). The Fifth Circuit in *Delta Tower*, citing *McKeesport*, states in pertinent part:

> [C]ourts have allowed a claimant to use § 506(c) if the trustee or debtor-in-possession refuses to pursue a claim of administrative expenses.

*Ibid.* The Fifth Circuit continues by reasoning that the failure to grant a third party standing may result in a windfall benefit to the secured creditors at the third party's expense. *Ibid.*

Finally, the First Circuit in *Parque Forestal* relies on the reasoning in *McKeesport* in granting standing to third party claimants. *In re Parque Forestal, Inc.*, 949 F.2d 504, 511-512 (1st Cir. 1991). The First Circuit reasoned that a third party should be granted standing where the third party has a justifiable claim against the secured creditors and the trustee has no incentive to pursue the claim. *Ibid.*

Petitioner mistakenly attempts to distinguish the reasoning of the Court of Appeals cases purely on semantics employed by the Courts, not reasoning employed by the Courts. A simple reading of Court of Appeals cases cited above clearly defines the standard for granting a third party standing under § 506(c). A third party may be granted standing under § 506(c) where the trustee has no incentive to seek recovery under § 506(c) and failure to pursue the claim would result in a windfall for the secured creditors at the expense of the unpaid claimant.

**C. Permitting Third Party Standing Under § 506(c) Is Severely Limited.**

Petitioner's assertion that permitting third party standing under § 506(c) creates chaos is unfounded and unreasonable.

First, the third party must have an administrative expense claim under § 503(b) before seeking standing under § 506(c). In order to charge a secured creditor with an administrative expense, the expense must meet three (3) criteria: (1) the expense must be a necessary expense, (2) the amount expended must be reasonable, and (3) the creditor must benefit from the expense. *Matter of Delta Towers, Ltd.*, 924 F.2d 74, 76 (5th Cir. 1991) citing *In re Trim-X, Inc.*, 695 F.2d 296, 299 (7th Cir. 1982).

Second, as outlined above, the trustee must have no incentive to seek recovery under § 506(c) for a third party to be granted standing under § 506(c). *In re McKeesport Steel Castings Co.*, 799 F.2d 91 (3rd Cir. 1986); *In re Palomar Truck Corp.*, 951 F.2d 229 (9th Cir. 1991); *Matter of Delta Tower, Ltd.*, 924 F.2d 74 (5th Cir. 1991); *In re Parque Forestal, Inc.*, 949 F.2d 504 (1st Cir. 1991).

Third, failure to pursue the claim must result in a windfall for the secured creditors at the expense of the unpaid claimant for a third party to be granted standing under § 506(c). *Ibid.*

Finally, the standard set forth in granting third party standing under § 506(c) would more than likely not apply to Chapter 7 liquidation cases. *See In re Palomar Truck Corp.*, 951 F.2d 229 (9th Cir. 1991). In Chapter 7 liquidation cases, there is a great need for the trustee to maintain

control of the liquidation of the estate. *Ibid.* A narrow reading of § 506(c) in Chapter 7 liquidation cases preserves the policy favoring parity of payment to all claimants in a class under § 726. *Ibid.*

The limitations placed on third party standing under § 506(c) demonstrate Petitioner's insupportable assertion of creating chaos in the administration of bankruptcy cases.

## CONCLUSION

Petitioner's arguments fail to recognize the facts particular to this case which support the decision of the Ninth Circuit. The Ninth Circuit fully considered and correctly decided the issue of third party standing under § 506(c) recognizing the particular facts that the trustee has no incentive to pursue this matter under § 506(c) and that failure to grant Respondent standing under § 506(c) will result in a windfall for Petitioner at Respondent's expense. Petitioner fails to show why this Court should reach a different result than the Ninth Circuit. Therefore, the petition should be denied and the Court should award Respondent all allowable attorneys' fees and costs.

Respectfully submitted,

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